IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.495 OF 2005

Abdul Rehman Ismail Shaikh & Ors. Appellants

Versus

Shamsuddin Haji (since deceased)

through legal heirs

Sajed Maulabas & ors. Respondents

Smt. Gauri K.Jadhav for appellants

Mr.S.S.Kulkarni for respondents

CORAM : P.V.KAKADE, J.

DATE : 14TH JUNE, 2005.

P.C.:

1. The appellants have preferred this appeal against the judgment and order passed by Addl. District Judge, Niphad dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior

Division, Yeola dated 12.8.1999 dismissing the suit for declaration and injunction filed by the plaintiffs.

2. The plaintiffs came with the case in the suit that CTS No.1125 belonged to him and CTS No.1124 located towards Western side of his house belonged to the defendants. According to the plaintiffs, the defendants had way towards northern side. On 30.5.1991 they tried to fix windows and door in the eastern side wall of their house CST No.1124 without obtaining any permission from the concerned authorises. There is a Ota (platform) belonging to the plaintiffs between the property of himself and defendants and plaintiffs have alleged that they had right of prescription over the said property, and therefore, the defendants should be restrained from using the said property in between the two houses as their right of way. Hence the suit came to be filed for declaration and injunction against the defendants. The defendants challenged the suit with submissions that the property in question did not belong to the plaintiffs nor the plaintiffs have any rights over the said property and as such the suit sought to be dismissed.

. The learned trial judge adjudicated the dispute on merits and on the basis of evidence he came to the conclusion that the plaintiffs have failed to prove that disputed Ota was part and parcel of their CTS No.1125. It was further held that it was not proved that the defendants were opening their door of their property on the disputed Ota and as such the plaintiffs were non suited in the suit. The appeal was carried to the District Court. The learned Addl. District Judge after hearing both the parties confirmed the findings and reasoning recorded by the lower court and dismissed the appeal. Hence the present appeal.

3. I heard the learned counsel for the appellant. It is quite apparent from the record that the disputed land in question in between the parties i.e. plaintiffs and defendants belongs to the State Government. The plaintiffs have ascertained their right of prescription over the suit property in order to have their right of way thereon. However, it is needless to mention that when such right is to be asserted and declaration is being sought for such right regarding property belonging to the State Government, the State Government would be necessary party to the suit and without State being

party, no right over the property belonging to the State could be determined in the nature as claimed by the plaintiffs. Moreover, there is absolutely no evidence on record to show that plaintiffs have any right of prescription over the suit property and as such on that count also the plaintiffs appears to have failed.

. In view of these aspects I am satisfied that both the courts below have properly appreciated the entire evidence on record. Moreover, there is absolutely no substantial question of law involved in this appeal. The appellants have amended the appeal memo in order to bring on record the substantial questions of law. However, on perusal thereof it is clear that those questions of law sought to be raised on assumption that the plaintiffs have any lawful possession of the suit property, which itself has not been proved and therefore, the question sought to be raised cannot be held to be relevant for our purpose to determine the real issue involved in this appeal.

4. In the result the appeal fails and stands dismissed.

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